IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA *ex rel.*
INTEGRA REC LLC,

Plaintiff,

v. **Civil Action No. 3:14cv706**

COUNTRYWIDE SECURITIES
CORPORATION, *et al.*,

Defendants.

MEMORANDUM OPINION

This matter comes before the Court on the Commonwealth of Virginia's Motion to Amend and Certify Order for Interlocutory Review Pursuant to 28 U.S.C. § 1292(b)[1] (the "Motion to Amend and Certify") and Motion to Stay. (ECF No. 99.) Countrywide Securities Corporation ("CSC") filed a response to the Motion, and the remaining four defendants in this removed action joined CSC's opposition. (ECF Nos. 101, 103–06.) The Commonwealth filed its reply. (ECF No. 107.) The matter is ripe for disposition. The Court dispenses with oral argument because the materials before the Court adequately present the facts and legal contentions, and argument would not aid the decisional process.

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[1] Section 1292(b) describes a process under which a district court and the court of appeals may permit an interim appeal from a "not otherwise appealable" order. 28 U.S.C. § 1292(b). The Court evaluates the application of this statute in detail in Sections II and III, *infra*.

The Court exercises jurisdiction pursuant to 28 U.S.C. § 1334(b)[2] and 1367.[3] For the reasons that follow, the Court will deny the Commonwealth's Motion to Amend and Certify and the Commonwealth's Motion to Stay. (ECF No. 99.)

I. Procedural and Factual Background[4]

In its Complaint originally filed in the Richmond Circuit Court, the Commonwealth of Virginia, on behalf of the Virginia Retirement System ("VRS"), alleges that defendants made fraudulent misrepresentations in offerings of mortgage-backed securities ("MBS"), also called certificates, or residential mortgage-backed securities ("RMBS"), also called certificates (collectively, "certificates"). CSC and four of its affiliates ("the Removing Defendants") removed the portion of the Richmond Circuit Court action they say involves every MBS certificate issued by Countrywide Financial Corporation ("CFC") and its affiliates. On October 24, 2014, CSC filed a Motion to Transfer this action to the United States District Court for the Central District of California. (ECF No. 15.) On October 31, 2014, the Commonwealth moved this Court to remand the action to the Richmond Circuit Court. (ECF No. 42.)

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[2] That statute states, in pertinent part: "[T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). A court has "related to" jurisdiction over all claims giving rise to contractual claims against entities in pending bankruptcy proceedings. *See In re Celotex*, 124 F.3d 619, 625 (4th Cir. 1997). In the Court's March 17, 2015 Memorandum Opinion and Order (the "March Opinion" or collectively, the "March Opinion and Order"), the Court concluded that it has such "related to" jurisdiction in this action. (*See* March 17, 2015 Memorandum Opinion ("March Mem. Op.") 4–5, ECF No. 85.)

[3] The Court exercises supplemental jurisdiction over any claims that do not give rise to contractual obligations upon entities in bankruptcy, pursuant to 28 U.S.C. § 1367(a) ("[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . . .").

[4] The Court assumes familiarity with the procedural and factual background of this case as summarized in its January 14, 2015 Memorandum Opinion and Order and its March Opinion and Order. (ECF Nos. 75–76, 85–86.) Those opinions and orders more fully describe the procedural and factual background of this case, and the Court repeats the background only to the extent necessary to inform for the present motion. All terms defined in those opinions and orders will continue unless otherwise noted.

On March 17, 2015, following a stay ordered by the Court (ECF Nos. 75–76), the Court entered the March Opinion and Order. (ECF Nos. 85–86.) The Court denied CSC's Motion to Transfer this action to the Central District of California and the Commonwealth's Motion to Remand as to mandatory abstention, permissive abstention, and equitable remand. (March Mem. Op. 7–12.) The Court also referred the parties to settlement proceedings with the Honorable David J. Novak, United States Magistrate Judge. (March Mem. Op. 12–13.) The parties scheduled a settlement conference to take place on June 9 and 10, 2015. (*See* Am. O. Regarding Proced. Settlement Conf. ("Am. Settlement Conf. O.") 1, ECF No. 118.)

The Commonwealth's present motion seeks interlocutory appeal only of the Court's denial of mandatory abstention pursuant to 28 U.S.C § 1334(c)(2).[5] (Commw. Mot. Amend 1, ECF No. 99.) In its March Opinion, the Court noted that of the five factors required for mandatory abstention, the parties contested only the final factor: whether "an action is commenced and can be timely adjudicated in state court." (March Mem. Op. 10.) The language of the fifth factor involves two considerations, meaning the failure to meet *either* the

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[5] That statute states, in pertinent part:

> (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 1334(c)(2).

"commencement" *or* "timely adjudication" prong blocks a party's ability to satisfy the mandatory abstention test.

While in the March Opinion this Court noted discussion among several courts regarding the application of both the "commencement" and the "timely adjudication" requirements, this Court ultimately found that the Commonwealth failed to meet any test articulated as to timely adjudication, and denied the motion for mandatory abstention without making what would have been an advisory analysis of the commencement prong of the mandatory abstention test. For instance, in its discussion of the judicial development of this factor's analysis, the Court simply noted that the United States Court of Appeals for the Fourth Circuit "has not spoken to the split of lower court authority as to when an action must have been 'commenced' under this test." (March Mem. Op. 10 (citing cases).) Because the Court made a finding as to timely adjudication, it did not further address the commencement prong of the test.

Instead, the Court observed that while the Fourth Circuit "has not resolved a split of lower court authority as to which party bears the burden of demonstrating whether a case can be timely adjudicated in state court, and what evidence is needed to meet the burden[,]" (*id.* (citing cases)), the Court had a record before it in which none of the evidence produced by either side "sufficiently educate[d]" the Court regarding the timely adjudication issue. (*Id.* at 11.) This finding necessarily placed the burden on the Commonwealth as the party moving for mandatory abstention, and found the evidence wanting. Because the Court could not make a finding that the evidence supported a timely adjudication in the Richmond Circuit Court based on the general caseload and judicial statistics before it, the Court could not find that the evidence supported mandatory abstention.

The finding as to timely adjudication rested primarily on the factual record before the Court notwithstanding the legal issue the Court had to address. In short, as to timely adjudication, the Court discussed the various evidentiary exhibits placed before it by both the Commonwealth and CSC that purportedly addressed the Richmond Circuit Court's ability to timely adjudicate the action. (*Id.* at 11–12). Largely because neither party addressed the progress of *any* proceeding in the Richmond Circuit Court,[6] the Court found the record "bereft" of adequate helpful evidence to allow it to make a finding that the Richmond Circuit Court could timely adjudicate this matter. (*Id.* at 12; *see also id.* at 9 ("The record before the Court does not present a solid basis for mandatory abstention.").)

The Commonwealth seeks certification of two questions for interlocutory review related to 28 U.S.C. § 1334(c)(2) (the "First Question" and the "Second Question"):

1. "[W]hether the provision stating 'if an action is commenced . . . in a State forum of appropriate jurisdiction' imposes an additional requirement that the state court action must have been filed prior to the related-to bankruptcy case." (Commw. Mot. Amend 1 (alteration in original).)

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[6] Oddly enough, the Court now has some evidence that the Richmond Circuit Court may be entertaining a dispositive motion regarding the preclusive effect of a federal class action settlement on the unremoved portion of the Commonwealth's original action. (*See* CSC Mem. Opp'n Mot. Amend 15 n.9, ECF No. 101; *see generally* Decl. Brian E. Pumphrey, ECF No. 102 (including an excerpt from a memorandum in support of such a motion).) The Court finds this peculiar for three reasons. First, such motion appears to have been filed on January 20, 2015, the same date the parties filed supplemental briefs in this Court on the motions to transfer, remand, and stay, yet no party presented this information to the Court at that time. Second, while CSC has now presented a portion of that motion to the Court, it provided the Court with no information regarding its present status in the Richmond Circuit Court. Finally, and perhaps most curious, the Commonwealth has never addressed the existence of the motion and failed to discuss its presence even in its reply to CSC's response in opposition to the Motion to Amend and Certify. Although the parties were not required to provide this Court with evidence on the Motion to Amend and Certify, the parties have yet again provided the Court with just a trace of useful evidence regarding the ability of the Richmond Circuit Court to timely adjudicate this action.

2. "[W]hich party bears the burden of demonstrating whether the 'action . . . can be timely adjudicated in a State forum of appropriate jurisdiction,' and what evidence is sufficient to satisfy the burden." (Commw. Mot. Amend 1 (alteration in original).)

II. Applicable Law: Interlocutory Review Pursuant to 28 U.S.C. § 1292(b)

The Commonwealth seeks an immediate appeal from the March Order. At the same time, the Commonwealth seeks a stay in this action – to commence after the "already referred . . . settlement conference" in the district court.[7] (Mot. Amend at 1–2.)

A. General Standards Underlying Interlocutory Appeal

As to the requirements for an appeal, "[f]ederal appellate jurisdiction generally depends on the existence of a decision by the [d]istrict [c]ourt that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Coopers & Lybrand v. Livesay*,

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[7] The Commonwealth continues to insist that remand to the Richmond Circuit Court, after appeal, is necessary to effectuate judicial economy. Yet many of the Commonwealth's actions belie their arguments for efficiency. During briefing on the previously ruled upon motions to remand, stay, and transfer, the parties filed two joint motions to extend the time allotted to file responses and replies to the pending substantive motions. (ECF Nos. 7, 53.) In the interest of judicial economy and recognizing the complexity of the case, the Court granted such extensions, allowing the parties substantially more time than the Federal Rules of Civil Procedure would normally allow. (ECF Nos. 27, 54.)

During a telephone conference on April 28, 2015, again through the agreement of the parties, the Court functionally halted the normal briefing process to allow the parties to focus on settlement. The Court allowed briefing on the preclusive effect of a federal class action to commence only if settlement did not succeed. A briefing schedule would be set during a conference call on June 15, 2015 should settlement fail. Now, in its Motion to Amend, the Commonwealth seeks a stay of the proceedings *following* the settlement conference on June 9 and 10 and before briefing would begin. (*See* Mot. Amend 1–2.)

The Court expresses dismay at the Commonwealth's procedural wrangling when the March Opinion plainly cites a federal class action settlement – identified by CSC at the onset of litigation – that may govern the case and could require dismissal. If the Court's observations are incorrect, the best use of litigative resources would be to address the issue posed by the Court directly, rather than to seek a procedural workaround so that a different court rules on the issue. The Court has ordered multiple delays with the Commonwealth's consent, and the Commonwealth now seeks an additional indeterminate stay while claiming, in essence, that it does so to save resources. This inconsistent position strains logic.

437 U.S. 463, 467 (1978) (citing *Catlin v. United States*, 324 U.S. 229, 233 (1945)). However, Congress has established narrow avenues by which litigants may pursue appeals of non-final orders. *See Katz v. Carte Blanche Corp.*, 496 F.2d 747, 753–54 (3d Cir. 1974) (discussing the legislative history of interlocutory appeals). Section 1292(b) provides litigants one such path to an interlocutory appeal "upon the consent of both the district court and the court of appeals." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1025–26 (9th Cir. 1982). Pursuant to Section 1292(b), a district court may certify a non-final order for interlocutory appeal when the court finds that the order sought for appeal involves (1) a controlling question of law (2) about which there is substantial ground for difference of opinion and (3) an immediate appeal therefrom may materially advance the termination of the litigation.[8] 28 U.S.C. § 1292(b).

The Court must begin a Section 1292(b) analysis "by emphasizing the gravity of the relief" sought in such a request. *Cooke-Bates v. Bayer Corp.*, No. 3:10cv261-JRS, 2010 WL 4789838, at *2 (E.D. Va. Nov. 16, 2010). Interlocutory appeals are an "extraordinary remedy," *Fannin v. CSX Transp., Inc.*, No. 88-8120, 1989 WL 42583, at *2 (4th Cir. Apr. 26, 1989) (unpublished) (per curiam), that sit contrary to "the well-established policy limiting appeals to final judgments." *Long v. CPI Sec. Sys., Inc.*, No. 3:12cv396-RJC-DSC, 2013 WL 3761078, at *1 (W.D.N.C. July 16, 2013) (citation omitted) (internal quotation marks omitted); *see Difelice v. U.S. Airways, Inc.*, 404 F. Supp. 2d 907, 908 (E.D. Va. 2005). Further, courts are "bound 'to protect the integrity of the congressional policy against piecemeal appeals.'" *Fannin*, 1989 WL 42583, at *2 (quoting *Switz. Cheese Ass'n v. Horne's Mkt., Inc.*, 385 U.S. 23, 25 (1966)); *see Xoom, Inc. v. Imageline, Inc.*, No. 3:98cv00542-JRS, 1999 WL 1611444, at *1 (E.D. Va. Sept. 3, 1999) (citing *James v. Jacobson*, 6 F.3d 233, 237 (4th Cir. 1993)); *Riley v. Dow*

[8] If the district court does not certify its order contemporaneously, the court may amend the order later to include the certification. Fed. R. App. P. 5(a)(3).

Corning Corp., 876 F. Supp. 728, 731 (M.D.N.C. 1992). Section 1292(b) is not intended to allow interlocutory appeals in ordinary suits, *Xoom*, 1999 WL 1611444, at *1, but instead should be utilized for "'orders deemed pivotal and debatable.'" *Difelice*, 404 F. Supp. 2d at 908 (quoting *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 46 (1995)). Thus, certification is "not to be granted lightly." *Fannin*, 1989 WL 42583, at *2.

Section 1292(b) ensures such an extraordinary remedy will not be granted lightly by requiring "dual judicial discretion" in the certification and acceptance of the appeal. *Cross v. Suffolk City Sch. Bd.*, No. 2:11cv88-RBS, 2011 WL 2838180, at *2 (E.D. Va. July 14, 2011) (citing *Myles v. Laffitte*, 881 F.2d 125, 126 n.2 (4th Cir. 1989)). First, the movant must demonstrate to the district court that he or she meets all three Section 1292(b) factors. *See Cooke-Bates*, 2010 WL 4789838, at *2. "Even if the requirements of [S]ection 1292(b) are satisfied, the district court has 'unfettered discretion' to decline to certify an interlocutory appeal if exceptional circumstances are absent." *Manion v. Spectrum Healthcare Res.*, 966 F. Supp. 2d 561, 567 (E.D.N.C. 2013) (citation omitted); *see Coopers & Lybrand*, 437 U.S. at 474 ("A party seeking review of a nonfinal order must first obtain the consent of the trial judge."); *State of N.C. ex rel. Howes v. W.R. Peele, Sr. Trust*, 889 F. Supp. 849, 852 (E.D.N.C. 1995) (noting that Section 1292(b) provides "great flexibility" to the district court). After certification in the district court, the court of appeals makes a separate determination as to the appropriateness of an interlocutory appeal.[9]

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[9] The Fourth Circuit has stated that courts should use Section 1292(b) "sparingly," *Myles*, 881 F.2d at 127, and only "'in exceptional situations in which [doing so] would avoid protracted and expensive litigation.'" *Fannin*, 1989 WL 42583, at *2 (alteration in original) (quoting *In re Cement Antitrust Litig.*, 673 F.2d at 1026). Accordingly, "given the basic policy of postponing appellate review until after the court has entered final judgment in the case, [Section] 1292(b) clearly places on the movant the burden of persuading the court that 'exceptional circumstances' justify a departure from that policy." *LeFleur v. Dollar Tree Stores, Inc.*, No. 2-12cv00363,

B. The Three Elements of Section 1292(b)

1. A District Court Must Find It Ruled on a Controlling Question of Law

The standards by which a district court must evaluate the three parts of Section 1292(b) are clear. The party seeking an interlocutory appeal must first demonstrate that the question sought for certification is a "controlling question of law." 28 U.S.C. § 1292(b). This element may be divided into two requirements: the question must be "controlling" and it must be one "of law." In order for a question to be "controlling," the district court must actually have decided such question. *Paschall v. Kansas City Star Co.*, 605 F.2d 403, 409 (8th Cir. 1979); *see Schwartz v. Rent a Wreck of Am., Inc.*, __ F. App'x __, No. 13-2189, 2015 WL 1020647, at *3 n.2 (4th Cir. Mar. 10, 2015) (unpublished). Controlling questions include those "whose resolution will be completely dispositive of the litigation, either as a legal or practical matter, whichever way it goes." *Fannin*, 1989 WL 42583, at *5. "Conversely, a question of law would not be controlling 'if the litigation would necessarily continue regardless of how that question were decided." *Wyeth v. Sandoz, Inc.*, 703 F. Supp. 2d 508, 525 (E.D.N.C. 2010) (quoting *Howes*, 889 F. Supp. at 852–53). When the resolution of a question would not completely end the litigation altogether, district courts look to whether the immediate appeal would be "serious to the conduct of the litigation, either practically or legally." *Katz*, 496 F.2d at 755–56.

Questions sought to be certified should be "narrow question[s] of pure law." *Fannin*, 1989 WL 42583, at *5. Even if a question "is technically one of law," if the issue is "heavily freighted with the necessity for factual assessment," the question is likely not proper for

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2014 WL 2121721, at *1 (E.D. Va. May 20, 2014) (quoting *Howes*, 889 F. Supp. at 853). Thus, even if the district court certifies an order for interlocutory appeal, the movant must still demonstrate the existence of "exceptional circumstances" to the court of appeals. *Fannin*, 1989 WL 42583, at *2.

Section 1292(b) interlocutory review. *Id.*; *see Xoom*, 1999 WL 1611444, at *2 (finding an issue not a "controlling question of law" because "it was in part based on facts" placed into evidence by the parties); *In re Jemsek Clinic, P.A.*, Nos. 06-31766, 06-319866, 07-03006, 07-03008, 2011 WL 3841608, at *3 (W.D.N.C. Aug. 30, 2011) (denying certification of a question that was "'grounded in the specific facts of the case, and cannot be divorced from [those] facts'" (alteration in original) (citation omitted)) (applying Section 1292(b) analysis to an interlocutory bankruptcy appeal). Pure questions of law include "matters the court of appeals can decide quickly and cleanly without having to study the record." *Long*, 2013 WL 3761078, at *2 (citation omitted) (internal quotation marks omitted).

2. A District Court Must Find A Substantial Ground for Difference of Opinion

Next, the party pursuing a Section 1292(b) interlocutory appeal must show that a "substantial ground for difference of opinion" exists as to the controlling questions of law. 28 U.S.C. § 1292(b). Such ground "must arise 'out of a genuine doubt as to whether the district court applied the correct legal standard in its order.'" *Wyeth*, 703 F. Supp. 2d at 527 (citation omitted). "[J]ust any simple disagreement between courts will not merit certification." *Cooke-Bates*, 2010 WL 4789838, at *2. A mere lack of unanimity, *Wyeth*, 703 F. Supp.2d at 527, or opposing decisions outside of the governing circuit, need not persuade a court that a substantial ground for disagreement exists. *Cross*, 2011 WL 2838180, at *3 n.1. "An issue presents a substantial ground for difference of opinion if courts, as opposed to parties, disagree on a controlling question of law." *Cooke-Bates*, 2010 WL 4789838, at *2 (citation omitted).

3. A District Court Must Find an Interim Appeal Would Materially Advance the Ultimate Termination of the Litigation

Finally, the party seeking interlocutory appeal must establish that certification would "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). "The mere fact that [the resolution of the question sought to be certified] at this time *may* save pre-trial and trial effort and expense is not determinative . . . ." *Fannin*, 1989 WL 42583, at *5 (citation omitted). Such speculation "of course can be said of any interlocutory appeal." *Id.* Instead, courts look to whether "'early appellate review might avoid protracted and expensive litigation.'" *Xoom*, 1999 WL 1611444, at *1 (quoting *Howes*, 889 F. Supp. at 852); *see In re Va. Elec. & Power Co.*, 539 F.2d 357, 364 (4th Cir. 1976) (finding interlocutory appeal would advance the ultimate termination of the litigation because the decision would prevent needless waste of "much time, expense and effort"). Accordingly, courts use a case-specific analysis to determine whether the time and expense saved on interlocutory appeal would "materially advance the ultimate termination of the litigation" as required by Section 1292(b).

III. Analysis

For the following reasons, the March Opinion and Order do not involve "a controlling question of law," nor would an immediate appeal from that decision "materially advance the ultimate termination of the litigation."[10] 28 U.S.C. § 1292(b). The First Question does not involve a controlling question of law, and any appeal could seek only an advisory opinion. The Second Question does not involve a controlling question of law because it turns upon an

[10] CSC also argues that no "substantial ground for difference of opinion" exists as to the questions sought for certification. The Court finds that neither of the questions involves "controlling questions of law" and that immediate appeal would not "materially advance the ultimate termination of the litigation." While the Court finds persuasive CSC's arguments as to a "substantial ground for difference of opinion," it need not address whether such difference of opinion exists. *See Cooke-Bates*, 2010 WL 4789838, at *2 n.4 (declining to address two of Section 1292(b)'s requirements after finding one element unsatisfied).

examination of the factual record in this case. Further, immediate appeal of the questions would not materially advance the termination of the litigation, and therefore certification would not be proper. Accordingly, the Court will deny the Commonwealth's Motion to Amend and Certify.

A. The First Question Is Not a Controlling Issue of Law and an Immediate Appeal Could Seek Only an Advisory Opinion

Because the Court denied mandatory abstention based on "timely adjudication" and not "commencement," the First Question does not constitute a controlling question of law. The Court did not make a ruling as to when an action need be commenced in a State forum, meaning an immediate appeal to the Fourth Circuit could seek only an advisory opinion. The First Question "necessarily misstates the Court's ruling in this case." *Xoom*, 1999 WL 1611444, at *1. While the Court discussed courts' differing approaches regarding the "commencement" of an action in a state forum, the March Opinion and Order clearly made no ruling on the interpretation of this phrase. (*See* March Mem. Op. 10.) A plain reading of the March Opinion shows that the Court based its ruling on the lack of useful evidence presented to it by the parties with respect to the timely adjudication prong only. (*See* March Mem. Op. 9, 11–12.) The Court cannot certify for interlocutory appeal a question not ruled upon. *See Paschall*, 605 F.2d at 409. Any Fourth Circuit ruling on an issue not addressed by this trial court would be advisory. *See Schwartz*, 2015 WL 1020647, at *3 n.2. Accordingly, the First Question does not involve a controlling question of law required by Section 1292(b). Thus, the Commonwealth fails to satisfy the first element required for an interlocutory appeal, and the Court will deny the Commonwealth's Motion to Amend as to the First Question.

B. The Second Question Is Inappropriate for Interlocutory Appeal

1. The March Opinion Placed the Burden of Proof on the Commonwealth

The Commonwealth's briefing suggests that the March Opinion did not sufficiently articulate the Court's intent to hold the Commonwealth, as the moving party, to a burden of proof regarding timely adjudication of this matter in state court. CSC correctly identifies that the Court implicitly placed the burden of proof as to timely adjudication on the Commonwealth. (CSC Mem. Opp'n Mot. Amend 9 n.2.) However, to the extent a lack of clarity exists, it requires no different outcome.

First, as CSC identifies, the March Opinion impliedly ruled that the Commonwealth, as the party moving for abstention, held the burden of proof. Indeed, as noted by the court in *Power Plant Entm't Casino Resort Ind., LLC v. Mangano*, 484 B.R. 290, 297–99 (Bankr. D. Md. 2012), when the parties present no evidence—or, as in this instance, no helpful evidence—regarding timely adjudication in state court, the resolution of this element "hinges on which party has the burden to show that a matter can be timely adjudicated in state court."[11] *Id.* at 297.

Second, to the extent the March Opinion would need the clarification only one party seeks here, the Court may, "on its own, with or without notice[,]" correct what could be

[11] The *Power Plant* court highlighted the importance of the burden when no evidence existed regarding the state court's ability to timely adjudicate the case. 484 B.R. at 297–99. If the party seeking abstention—here the Commonwealth—holds the burden but presents no helpful evidence, the court would necessarily deny the motion and retain the action in federal court. *See id.* Conversely, if CSC, when opposing abstention, held the burden but provided no helpful evidence, the Court would have abstained from the case. *See id.* The first example proved true in this Court. In the March Opinion, the Court found that a lack of helpful evidence existed on the record and denied the motion to abstain. Thus, the Court impliedly held that the Commonwealth bore the burden of proof.

characterized as "a mistake arising from oversight or omission." Fed. R. Civ. P. 60(a).[12] *See Sartin v. McNair Law Firm PA*, 756 F.3d 259, 265–66 (4th Cir. 2014). As noted above, the Court implicitly placed, and still intends to place, the burden of proof on the Commonwealth, the moving party, regarding timely adjudication. To the extent the March Opinion might "include[ ] an unintended ambiguity that obfuscates the court's original intent," *Sartin*, 756 F.3d at 266, and "consistent with the intent of the original [opinion]," *id.*, the Court now clarifies that the March Opinion placed the burden of proof regarding timely adjudication on the Commonwealth.[13]

Third, the "correct inquiry [as to timely adjudication] is whether the claim will be timely adjudicated in state court." *Massey Energy Co. v. W. Va. Consumers for Justice*, 351 B.R. 348, 352 (E.D. Va. 2006). Thus, the Court's ultimate conclusion, that it had conflicting general information and no specific evidence as to this issue, is consistent with case law. At least two other courts have addressed timely adjudication without an analysis of the burden and decided to remand based on the very evidence the Court found lacking in this case. *See, e.g.*, *Bender v. Insight Health Corp.*, Nos. 7:13cv00157, -158, -159, 2013 WL 1952150, at *1 n.1 (W.D. Va.

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[12] That rule states, in pertinent part:

> **(a) Corrections Based on Clerical Mistakes; Oversights and Omissions.** The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice . . . .

Fed. R. Civ. P. 60(a).

[13] The Court notes that it was most persuaded by the traditional notion that the moving party carries the burden of proof. *See In re Freeway Foods of Greensboro, Inc.*, 449 B.R. 860, 878 (Bankr. M.D.N.C. 2011). (*See* March Mem. Op. 10.) The Court has established jurisdiction over this case (*see* March Mem. Op. 4–5), and the Court holds a responsibility to exercise its jurisdiction unless some rule demands otherwise. In light of the Commonwealth's failure to satisfy its burden of proof, no rule demands that the Court decline to exercise jurisdiction in this matter.

Should the parties desire a separate order clarifying the March Opinion, they may petition the Court with such a request.

May 10, 2013) (finding the timely adjudication element met when the parties had submitted affidavits and other filings to show that the state case was moving swiftly, with partial summary judgment already issued and a plan to address factual and legal issues moving forward); *Massey Energy Co.*, 351 B.R. at 352 (finding the timely adjudication element met when the parties showed that discovery had commenced, motions had been heard, a final trial date had been set, and further continuances would be denied by the state court).

Finally, as the Court discusses in Section III.B.2, *infra*, independent of the implicit finding as to burden made by this Court, the Second Question is too heavily freighted with factual assessment to be appropriate for interlocutory appeal.

2. The Second Question Is Not a Controlling Question of Law Because It is Too Heavily Freighted with Factual Assessment

Regardless of any ambiguity regarding the party that carries the burden, the Second Question as to which party bore the burden of demonstrating timely adjudication is not a controlling question of law because its analysis would necessarily require a factual assessment beyond that which is appropriate on an interlocutory appeal under Section 1292(b). The Court ruled that no party presented sufficiently helpful evidence to allow this Court to find that the Richmond Circuit Court could timely adjudicate this action. (*See* March Mem. Op. 11–12.) When it ruled, the Court had conflicting general evidence, but no specific insight, as to how efficiently the state court action could proceed, or was proceeding. The Court considered various exhibits submitted by both the Commonwealth and CSC. (*Id.*) As such, the Court's ruling necessarily took into account questions of fact not appropriate on an interlocutory appeal. *See Fannin*, 1989 WL 42583, at *5.

The Court feels it necessary to point out a distinction in its ruling. The Court did not hold that the parties presented *no evidence at all* on the issue of timely adjudication. Rather, the

Court held that the evidence presented by both parties was *unhelpful* in its analysis. The Court found that, while it would not undergo an analysis of the relative state and federal court dockets, the fact that the parties omitted any mention of the specific status of the related litigation at the state court level prevented the Court from evaluating an important aspect of the timely adjudication analysis. (March Mem. Op. 12.) The Court ruled that the only evidence before it was contradictory: it could not make a timely adjudication finding based on a court being "generally busy," based on dated articles about judicial vacancies, or based on statistics that showed both swift decisions and cases that languished for years. (March Mem. Op. 11–12).

That said, any determination by another court on appeal would necessarily involve reviewing the law *and* weighing the facts. Thus, unlike questions of pure law, these factual questions cannot be "decide[d] quickly and cleanly without having to study the record." *Long*, 2013 WL 3761078, at *2 (citation omitted). Because the Second Question grounds itself in the "specific facts" presented by the parties, its resolution proves inappropriate for interlocutory appeal. *In re Jemsek Clinic*, 2011 WL 3841608, at*3. Accordingly, the Second Question does not pose a controlling question of law as required by Section 1292(b). Thus, the Commonwealth fails to satisfy the first element required for an interlocutory appeal, and the Court will deny the Commonwealth's Motion to Amend as to the Second Question.

C. An Immediate Appeal from the Opinion and Order Would Not Materially Advance the Ultimate Termination of this Litigation

The Court also finds that an immediate appeal from the March Opinion would not materially advance the ultimate termination of the litigation in this case. An immediate appeal, even were it to be granted, would only delay the trial process further, especially in light of the stay requested by the Commonwealth. Even were an immediate appeal certified by this Court, heard by the Fourth Circuit, and ruled upon in the Commonwealth's favor, such ruling would not advance an ultimate termination of the litigation. Presumably, the case would first return to this Court under remand to implement a finding as to timely adjudication. Next, this Court likely would have to make a finding on the First Question regarding "commencement" as it applied to the record in this case. Only then could the case advance. And that progress would amount to continued litigation in this federal court, or in state court upon remand from this Court. The case would not terminate.

This action has been pending in this Court for over six months, and its progression has been characterized by multiple procedural motions. The Court has yet to see a motion or pleading, with the exception of the Complaint, regarding the merits of the Commonwealth's claims. In the event that the scheduled settlement proceedings do not prove successful, the Court has ordered a status conference to order expeditious briefing on a potentially dispositive summary judgment motion: the preclusive effect of the *Luther* federal class action,[14] which presents "an important question of federal law."[15] (March Mem. Op. 7–8 (noting that a review of the *Luther* documents suggests "that 17 of the 22 certificates in this action are included in the settlement.").) (*See* March Mem. Op. 12–13; April 28, 2015 docket entry (setting June 15, 2015 conference call to establish briefing on the *Luther* class issue).)

[14] *Luther v. Countrywide Fin. Corp.*, No. 2:12-cv-05125-MRP (MANx) 1, ECF No. 320 (C.D. Cal. Dec. 5, 2013) (final order approving class settlement).

[15] The Supreme Court of the United States directs that "[t]he preclusive effect of a federal-court judgment is determined by federal common law." *Taylor v. Sturgell*, 553 U.S. 880, 890 (2008). (*See* March Mem Op. 7.)

Certification of the March Opinion and Order for interlocutory appeal would only further delay such briefing.[16] *See Difelice*, 404 F. Supp. 2d at 910. In addition, the stay sought by the Commonwealth "while it pursues appeal [would] only exacerbate[ ] the delay inherent in interlocutory appeal on these facts." *Long*, 2013 WL 3761078, at *4. Finally, even if all went in the Commonwealth's favor—that is, this Court certified the March Opinion and Order; the Fourth Circuit accepted the interlocutory appeal; and, the Fourth Circuit reversed this Court as to its finding on timely adjudication—the appeal would, likely, at best result in a remand of this action to this Court to implement a timely adjudication finding and then determine "commencement" on the facts of this case. If the Commonwealth again prevailed, a remand to the Richmond Circuit Court would take place, where the action will be no more advanced on the merits than it now stands.

Here, certification cannot "materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b), because it "would only serve to further delay the trial process." *Riley*, 876 F. Supp. at 731. Thus, the Commonwealth also fails to meet the third prong required to establish a basis for interlocutory appeal, and the Court will deny the Commonwealth's Motion to Amend as to both the First and Second Questions.

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[16] Indeed, it seems that the arguments made by the Commonwealth regarding the judicial economy of an immediate appeal—the efficiency of consolidating the removed action with the original action—only reiterate its position taken on permissive abstention and equitable remand. (*Compare* Commw. Mem. Supp. Mot. Amend 7, ECF No. 100, *with* Commw. Supp'l Br. Supp. Mot. Remand 2–3, ECF No. 83.) The Court has already rejected these arguments and found judicial economy best served by retaining the action in this Court to determine the preclusive effect of a potentially related class action settlement. (March Mem. Op. 9.)

IV. The Motion to Stay Is Moot

Because the Court denies this motion, the proceedings will continue as presently scheduled, and the Commonwealth's Motion to Stay is rendered moot. The Court will deny the Motion to Stay as moot.

V. Conclusion

For the reasons stated above, the Court denies the Commonwealth's Motion to Amend and Certify Order for Interlocutory Review and the Commonwealth's Motion to Stay. (ECF No. 99.)

An appropriate Order shall issue.

/s/ MHL
M. Hannah Lauck
United States District Judge

Richmond, Virginia
Date: 6/3/15